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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AMALGAMATED CLOTHING WORKERS OF AMERICA, AMALGAMATED MEAT CUTTERS, AMERICAN FEDERATION OF TEACHERS, INTERNATIONAL TYPOGRAPHICAL UNION, NATIONAL FARMERS UNION, TRANSPORT WORKERS UNION, UNITED AUTOMOBILE WORKERS, AND UNITED PACKINGHOUSE WORKERS

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TABLE OF CONTENTS

	PAGE
Interest of Amici	1
Statement of the Case	3
ARGUMENT	
I. Section 9(h) is unconstitutional as a Bill of Attainder	4
II. Section 9(h) is unconstitutional under the First and Fifth Amendments	9
III. Petitioner's motions for the production of the Grand Jury testimony of key prosecution witnesses were erroneously denied	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

American Communications Association v. Douds, 339 U. S. 382 ..... 6, 7, 9

Aptheker v. Secretary of State, 378 U. S. 500 ..... 10, 11

Bates v. Little Rock, 361 U. S. 516 10

Dennis v. United States, 302 F. 2d 5 3

Louisiana v. NAACP, 366 U. S. 293 10

PAGE

NAACP v. Alabama, 357 U. S. 449 10
NAACP v. Button, 371 U. S. 415 10

Pittsburgh Plate Glass v. United States, 360 U. S. 395 12

Scales v. United States, 367 U. S. 203 10
Shelton v. Tucker, 364 U. S. 479 10
Staub v. City of Baxley, 355 U. S. 313 10

Thomas v. Collins, 323 U. S. 516 10

United States v. Brown, 381 U. S. 437 ..... 2, 4, 5, 6, 7, 8, 9
United States v. Lovett, 328 U. S. 303 ..... 6, 7

Yates v. United States, 367 U. S. 290 10

Constitution

Constitution of the United States:
First Amendment 4, 9, 11
Fifth Amendment 4, 9, 11

Statutes

18 U. S. C. 371 3

Section 9(h) of the Taft-Hartley Act, 29 U. S. C. 159(h) 2, 3, 4, 5, 6, 7, 8, 9, 11

Section 504 of the Labor-Management Reporting and Disclosure Act (73 Stat. 519) 2, 4, 5, 7, 8

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October Term, 1965

No. 502

Raymond Dennis, *et al.*,

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—v.—

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Respondent.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AMALGAMATED CLOTHING WORKERS OF AMERICA, AMALGAMATED MEAT CUTTERS, AMERICAN FEDERATION OF TEACHERS, INTERNATIONAL TYPOGRAPHICAL UNION, NATIONAL FARMERS UNION, TRANSPORT WORKERS UNION, UNITED AUTOMOBILE WORKERS, AND UNITED PACKINGHOUSE WORKERS

Interest of Amici*

The American Civil Liberties Union is a private, non-partisan organization engaged solely in the preservation and defense of the Bill of Rights. The National Farmers Union is an independent association of family farmers within the United States. The Amalgamated Clothing Workers, Amalgamated Meat Cutters, American Federation of Teachers, International Typographical Union, Transport Workers Union, United Automobile Workers, and United Packinghouse Workers are international trade

*This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

unions affiliated with the labor federation known as the AFL-CIO.

Each of the amici believe that Section 9(h) of the Taft-Hartley Act, the statute upon which the convictions in this case rest, is unconstitutional. That statute, prior to its repeal in 1959, foreclosed a trade union's access to the services of the National Labor Relations Board if its officers did not file affidavits of non-membership or affiliation with the Communist Party.

Amici are especially interested in this case because they are opposed to government-imposed loyalty tests, both in general and as a pre-requisite for holding office or employment in a private organization. They are opposed in particular to such tests as a condition for the receipt of a benefit otherwise made freely available by statute.

It is the belief of each of the amici that a mature trade union movement is capable of determining its own internal policies without the kind of governmental compulsion reflected either in Section 9(h) or in its successor statute, Section 504 of the Labor-Management Reporting and Disclosure Act, which was held unconstitutional in *United States* v. *Brown*, 381 U. S. 437.

Statement of the Case

The petitioners, all of whom were or had been officers or staff employees of the International Union of Mine, Mill and Smelter Workers, were indicted in 1956 for conspiring to defraud the United States government in violation of the fraud clause of the general conspiracy statute, 18 U. S. C. 371. The gravamen of the indictment charged that petitioners conspired to defraud the government by falsely denying that they were members of or affiliated with the Communist Party, as required by Section 9(h) of the Taft-Hartley Act, repealed in 1959. The affidavits in question were filed from 1949 to 1955. The testimony at trial concerned acts by individual defendants over a period of seven years and in such diverse locations as Cleveland, Ohio, Bessemer, Alabama, and Denver, Colorado. At least one of the government witnesses was a co-conspirator whose nolo contendere plea was then under advisement.

Petitioners' convictions at their first trial in 1959 were reversed on appeal. *Dennis* v. *United States*, 302 F. 2d 5 (10th Cir., 1962). Their subsequent conviction on retrial was affirmed 346 F. 2d 10 (10th Cir., 1965).

ARGUMENT

I.

Section 9(h) is unconstitutional as a Bill of Attainder.

Section 9(h) of Taft-Hartley Act, 29 U. S. C. 159(h), had "conditioned a union's access to the National Labor Relations Board upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party." *United States* v. *Brown*, 381 U. S. 437.

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act (73 Stat. 519), Section 504 of which "was enacted to replace Section 9(h) of the Taft-Hartley Act." *United States* v. *Brown*, *supra*, at 439. Section 504 made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. By Section 201(d) of the Act, Section 9(h) of Taft-Hartley was simultaneously repealed.

> "Section 504 (of the Act of 1959) was designed to accomplish the same purpose as Section 9(h), but in a more direct and effective way. H. R. Rep. No. 741, 86th Cong. 1st Sess., p. 36." *United States* v. *Brown*, *supra*, at 439, n. 2.

In 1961, Archie Brown, a member of the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union, was indicted and convicted for violating Section 504. His conviction was reversed by the Court of Appeals for the Ninth Circuit, sitting en banc, on the ground that Section 504 violated the First and Fifth Amend-

ments to the Constitution. This Court granted certiorari and affirmed the reversal of the conviction on the ground that Section 504 was unconstitutional as a Bill of Attainder. We contend here that the Court's conclusion in *Brown* that Section 504 of the 1959 Act was "enacted to replace Section 9(h) of the Taft-Hartley Act," and "was designed to accomplish the same purpose as Section 9(h)," in conjunction with its holding that Section 504 was unconstitutional, compels the conclusion that Section 9(h) of Taft-Hartley is constitutionally invalid for the following reasons.

With Section 9(h), as with Section 504, the Constitution's proscription of bills of attainder has been violated. Therefore, this Court's reasoning in *Brown* applies with equal vigor to the instant case.

Mr. Chief Justice Warren expressed the basis for the unconstitutionality of Section 504 in the following language:

> "The statute does not set forth a generally applicable rule declaring that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party." *United States* v. *Brown, supra* at 450.

Accordingly, this Court noted that in *Brown* it "was neither charged nor proven that Respondent at any time

advocated or suggested illegal activity by the union, or performed a political strike." *United States* v. *Brown*, *supra* at 440.

Any doubt about this matter is completely dispelled by the fact that both statutes seek to deal with "membership" in the "Communist Party" and to penalize union officers who fall within the offending category. Thus, this Court said the following in *U. S.* v. *Brown*, *supra*, at 450, n. 24:

> "We of course take no position on whether or not members of the Communist Party are in fact likely to incite political strikes. *The point we make is rather that the Constitution forbids Congress from making such determinations.*" (Emphasis supplied.)

Second, this Court in *Brown* severely eroded the foundation of *American Communications Association* v. *Douds*, 339 U. S. 382, which upheld the constitutionality of Section 9(h), by finding that its reading of *United States* v. *Lovett*, 328 U. S. 303 was erroneous:

> "We think that the Court in Douds misread *United States* v. *Lovett* when it suggested, 339 U. S. at 413, that that case should be distinguished on the ground that sanction there imposed was levied for purely retributive reasons." *United States* v. *Brown*, *supra*, at 460.

Since the *Douds'* view that the absence of retribution in 9(h)—that is, the absence of the application of that provision to former members of the Communist Party—was determinative of the question whether 9(h) was punitive, has been rejected, the conclusion that a very significant portion of the *Douds* rationale is mistaken, or at best irrelevant, must follow. For it was the very absence of this kind of

retribution in 9(h) which permitted *Douds* to avoid this Court's previous decisions and thus leave that provision intact. It is particularly important here, of course, that the treatment by the *Douds* decision of both *Lovett* and the question of retribution took place within the discussion of Section 9(h)'s constitutionality under the Bill of Attainder Clause.

Indeed, this Court in *Brown* noted that *Douds* merely attempted "to prove its assertion that Section 9(h) was prohibitive rather than retributive in purpose. . . ." *Brown* was quite explicit in limiting this "assertion" to *Douds* itself. *Brown* clearly minimized the differences between 9(h) and 504:

> ". . . even if we make the assumption that the five year provision was inserted *not out of desire to visit retribution but purely out of a belief that failure to include it would lead to pro forma resignations from the Party which would not decrease the threat of political strikes,* it still clearly appears that Section 504 inflicts 'punishment' within the meaning of the Bill of Attainder Clause. It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes, retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crime is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." (Emphasis supplied.)

Though this Court in *Brown* distinguished *Douds* as "not necessarily controlling," pointing out that under Section 9(h) Communist Party members could escape from the specified class simply through resignation, it nevertheless left open to attack the weight accorded this factor in *Douds*:

"We do not read either opinion (*Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, or *Douds*) to have set up inescapability as an absolute pre-requisite to a finding of attainder. Such an absolute rule would have flown in the face of explicit precedent, *Cummings* v. *Missouri*, 4 Wall. 277, 324, as well as the historical background of the constitutional prohibition." *United States* v. *Brown, supra*, at 457, n. 32.

Third, it should also be noted that this Court, in striking down Section 504, viewed its purpose as "preventive" and similar to those of a number of English bills of attainder. This Court said that both the former and the latter were the result of legislative judgments " . . . based largely on past acts and association . . . that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivation upon that person or group in order to keep them from bringing about the feared event." *United States* v. *Brown, supra*, at 458-459. Not only does this description perfectly fit Section 9(h), but the Court also suggested that Section 9(h) as construed in *Douds*, Section 504, and several early English and American bills of attainder, had similar legislative histories. *United States* v. *Brown, supra*, at 458-460. Truly, Section 9(h) is the " . . . legislative punishment, of any form or severity, of specifically designated persons or groups" to which this Court pledged unceasing hostility in *Brown*.

Finally, four Justices of this Court subscribe to the following viewpoint articulated in Mr. Justice White's dissenting opinion in *Brown*:

"*American Communications Assn.* v. *Douds*, 339 U. S. 382, which upheld the predecessor statute to Sec. 504

is obviously overruled. . . . The Bill of Attainder Clause now forbids Congress to do precisely what was validated in *Douds*." *United States* v. *Brown*, *supra*, at 464-465.

We submit that the dissent's characterization of *Brown* is an accurate one. Here, as in *Brown*, disqualification of Union officers turns on their membership in the Communist Party. This is exactly what *Brown* condemns. Thus, for all the foregoing reasons, Section 9(h) must fail as a bill of attainder in the instant case.

II.

Section 9(h) is unconstitutional under the First and Fifth Amendments.

We contend that the Ninth Circuit's holding in *Brown* v. *United States*, 334 F. 2d 488, provides a further ground upon which these convictions should be reversed. More precisely, it is our position that Section 9(h) is an unconstitutional restraint on freedom of association and, as was said by the Ninth Circuit in *Brown*, ". . . The relationship between the conduct or status punished and the evil maintained here to be prevented is not sufficiently gross or substantial to meet the requirements of either the First or Fifth Amendments. . . ." 334 F. 2d at 496. Thus, to the extent that *Douds* upheld Section 9(h) of Taft-Hartley against the First Amendment challenge, we ask the Court to overrule *Douds* on substantially the same grounds relied upon by the Ninth Circuit. We believe that this case is controlled by the line of decisions which flow from the freedom

of association doctrine enunciated in *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958).

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

Accord, *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479; *Louisiana* v. *NAACP*, 366 U. S. 293; *NAACP* v. *Button*, 371 U. S. 415. See also *Staub* v. *City of Baxley*, 355 U. S. 313, *Thomas* v. *Collins*, 323 U. S. 516 which both upheld constitutional rights of union organizers.

In the instant case, as in *Aptheker* v. *Secretary of State*, 378 U. S. 500, there is no established relationship between the statute and the objectives which it attempts to achieve. Here, as in *Aptheker*, the statute "renders irrelevant the member's degree of activity in the organization and his commitment to its purpose." Cf. *Yates* v. *United States*, 367 U. S. 290, 299; *Scales* v. *United States*, 367 U. S. 203.

Moreover, Section 9(h) presents a more severe limitation on First and Fifth Amendment rights than did *Aptheker* for the latter case was concerned only with the passport rights of *individuals*. Here one is not concerned with the impingement on association of union officials *alone*. Also presented is the deprivation of the union member's right to freely elect leaders of his own choosing and, perhaps more important, the consequent withdrawal of rights for all members and employees within the bargaining unit which are normally enjoyed under the National Labor Relations Act.

The fact is that no attempt has ever been made to treat union officials who are members of the Communist Party on an individual basis under Section 9(h). Thus, the instant case presents this Court with a statute even more oppressive than that involved in *Aptheker*. The liberties at issue in this case are of equal importance at the very least.

Accordingly, the judgment must be reversed on the ground that Section 9(h) is unconstitutional under the First and Fifth Amendments.

III.

Petitioner's motions for the production of the Grand Jury testimony of key prosecution witnesses were erroneously denied.

As Petitioner has pointed out in its Brief (pp. 36-53) none of the factors alluded to in *Pittsburgh Plate Glass* v. *United States*, 360 U. S. 395, which argues for the suppression of testimony are present in this case. Thus, the encouragement of witnesses to testify freely without fear—the only relevant consideration under which secrecy could outweigh the "particularized need" which *Pittsburgh Plate Glass* requires of the Defendant—need not be of concern in this case. Seven years and two trials have passed by between the sitting of the Grand Jury and the demand for the testimony. We agree with Petitioners' statement at page 46 of their Brief: "... There is no possible foundation for a supposition that disclosure of their testimony would operate as a deterrent to the grand jurors or witnesses, either in this or in other cases...."

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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